

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
NO. 97-O-01**

DATE ISSUED: November 10, 1997

ISSUED TO: Burleigh County Sheriff Bob Harvey
 Burleigh County States Attorney Patricia Burke

CITIZEN'S REQUEST FOR OPINION

On October 17, 1997, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Tim Fought based on the refusal of Burleigh County Deputy Sheriff Jerry Wutzke and Burleigh County State's Attorney Patricia Burke on the afternoon of October 16, 1997 to allow the Bismarck Tribune access to public records which would identify three persons injured in an accident. The opinion request stated that neither Wutzke nor Burke would cite a law that exempts the records of the accident from the requirement that the records be open. The records were released on the morning of October 17, 1997.

FACTS PRESENTED

In a follow-up phone call to Janell Cole, the Bismarck Tribune reporter who had talked with Deputy Wutzke and Patricia Burke, Ms. Cole stated she had called the Burleigh County Sheriff's office on the afternoon of October 16th and was told she may be able to get the names of the accident victims later in the day. She called back around 3:30 p.m. and was told no report had been written up yet. She talked with Deputy Wutzke and was told that although he knew the names of the occupants of the cars, he had been directed by the Burleigh County State's Attorney not to release any information. Ms. Cole then called the state's attorney's office sometime after 3:30 p.m. when Ms. Burke had left for a meeting and left a request that Ms. Burke return her call.

Following receipt of the opinion request, this office contacted Burleigh County State's Attorney Patricia Burke to confirm the facts contained in the letter from Mr. Fought. According to Ms. Burke, it was after 5:00 p.m. on October 17 when she reached Ms. Cole from her home telephone. The traffic accident had occurred that morning. Ms. Burke did not have a copy of the accident report, nor had she seen any report of the accident at that time. She had been informed by Burleigh County Sheriff Bob Harvey that the sheriff's office was still investigating to determine whether

any criminal charges would be brought for reckless driving, a class B misdemeanor. Ms. Burke stated she told Ms. Cole that they were still investigating to determine whether there would be any criminal charges; she did not have a copy of the North Dakota Century Code at home, and therefore would provide the statutory cite for the exception from open records the next morning when she was back in the office, if Ms. Cole would call her then. She did not hear back from Ms. Cole. Ms. Burke informed this office that she was relying on the exemption from open records for an active criminal investigation in not releasing the records identifying the juveniles in the car on Thursday. The records were released the next morning.

In a telephone call to Deputy Wutzke following receipt of the opinion request, Deputy Wutzke stated that when he spoke with Ms. Cole, neither the state crash report nor the accident report had been written up. The only written record he had containing the names were his handwritten field notes. He did give Ms. Cole the name of the adult involved in the accident. He stated that before he spoke with any media representatives, he talked with Sheriff Harvey, who checked with State's Attorney Burke. According to Deputy Wutzke, his office was advised by Ms. Burke not to give out the names of the juveniles. It was almost 7:00 p.m. when he completed the reports.

ISSUES

1. Were there records identifying the occupants of the cars in the office of the Burleigh County State's Attorney at the time the records were requested from State's Attorney Burke?
2. Were there records identifying the occupants of the car in the possession of the Burleigh County Sheriff or his agents at the time the records were requested from the sheriff's department?
3. Was the identity of the occupants of the cars involved in the accident subject to any exception to the open records law?
4. Was the Burleigh County State's Attorney required to state a specific citation to a statute containing an exemption, or was identifying the exemption without giving the statutory citation sufficient?

5. If no exception to the open records law applied to the requested records, did the release of the copies of the accident reports the next morning comply with the statutory requirement to make the records available to the public within during reasonable office hours?

ANALYSES

Issues One And Two:

Addressing the first two issues is important because a public entity or its agent is not required or able to provide access to records which it does not possess or which do not exist. The law requires open records, not open minds. N.D.C.C. § 44-04-17.1. Therefore, if Deputy Wutzke or Ms. Burke had knowledge of the identity of the occupants of the cars, but no documents which revealed their identities, that official would not be required under the open records law to reveal the identity of the occupants--although either would be authorized to do so pursuant to N.D.C.C. § 44-04-18.10(3). Whether such records existed or were in the possession of the Burleigh County Sheriff's Department or the Burleigh County State's Attorney is a question of fact. Opinions issued under N.D.C.C. § 44-04-21.1 are to be based on the facts given by the public entity. N.D.C.C. § 44-04-21.1(1).

Deputy Wutzke had not begun filling out the accident report or the state crash report at the time he spoke with Ms. Cole. The only "recording" he had of the names of the juveniles in the cars was his handwritten field notes. The field notes of a vehicle accident are not confidential, although it is possible the notes could contain some confidential or closed information. If that were the case, Deputy Wutzke would be required by N.D.C.C. § 44-04-18.10 to excise any information which was confidential or closed and disclose the remainder of the document.

Therefore, whether the sheriff's department's failure to allow Ms. Cole access to Deputy Wutzke's field notes containing the names of the occupants of the cars constituted a violation of the open records law depends on whether the names are exempt or confidential under the law. Whether the names of the juveniles involved in the car accident are closed or confidential is covered below under issue number three.

Based on information received from Ms. Burke, she did not have any record of the names of the juveniles involved in the accident at the time she spoke with Ms. Cole on the afternoon of October 16. Ms. Burke was not under any requirement under the open records law to identify the occupants of the cars over the telephone and could not provide a copy of a record she did not have. Consequently, Ms. Burke's refusal to personally identify the names of the juveniles involved in the accident did not violate the law requiring access to public records during reasonable office hours.

Issue Number Three:

The third issue is whether information concerning the identity of the juvenile occupants of the cars, if such information existed in a recorded form, was subject to any exemption to the open records law. During the 1997 legislative session, N.D.C.C. § 12.1-35-03 was amended to address the issue of names of traffic accident victims and witnesses not being made available immediately after an accident. 1997 N.D. Sess. Laws ch. 138, § 3. N.D.C.C. § 12.1-35-03 prohibits the name or identifying biographical information of any child victim or witness of a crime from appearing in any public record. The 1997 amendment provided that this prohibition does not apply to a "child victim or witness of a criminal offense under title 39 or equivalent ordinance" or to a child victim of a fire. N.D.C.C. § 12.1-35-03(2); 1997 N.D. Sess. Laws ch. 138, § 2. Reckless driving and aggravated reckless driving are both criminal offenses under N.D.C.C. Title 39. N.D.C.C. § 39-08-03. Therefore, N.D.C.C. § 12.1-35-03 does not exempt the names of juveniles involved in a motor vehicle accident.

The release of the names of the occupants of a motor vehicle involved in an accident does not indicate whether any criminal investigation is being conducted. Further, the information is known as a result of the investigation of the accident and apart from any criminal investigation which may also be taking place. Therefore, it is my opinion that there is no specific exemption for the names of minors involved in traffic accidents unless the minors are seriously injured or dead. In that case, N.D.C.C. § 39-08-10.1 would apply and the names could not be released until the immediate family was notified or 24 hours following identification, whichever occurred first. Likewise, other than N.D.C.C. § 39-08-10.1, there is no exemption for records of the names of adults

involved in a motor vehicle accident. No claim has been made in this situation that any of the minors were injured seriously enough to invoke the provisions of N.D.C.C. § 39-08-10.1.

Issue Number Four:

The fourth issue requires an examination of how specific the reason for denial must be under N.D.C.C. § 44-04-18(6). This subsection states: "A denial of a request for records made under this section must describe the legal authority for the denial and must be in writing if requested." Ms. Cole did not request that the denial be in writing. Therefore, the issue is only whether the legal authority given was sufficient, or whether volunteering to provide the legal citation for the denial during normal office hours the next day was sufficient. Unless defined in the statute, words in a statute are to be given their ordinary meaning. N.D.C.C. § 1-02-02. "Describe" means to "give a verbal account of. . . to transmit a mental image or impression with words". The American Heritage Dictionary 385 (2d coll. ed. 1991).

In this case it appears that Ms. Burke did not directly deny access to a public record during reasonable office hours. However, even if a record identifying the occupants of the cars existed at the time requested, the statute does not specifically require the public entity to provide the legal citation to the state statute or federal law or regulation which provides the basis for the exemption. Therefore, it is my opinion that providing a verbal explanation of the legal basis for denial is sufficient to comply with the terms of N.D.C.C. § 44-04-18(6). However, I would encourage public entities to also provide the legal citation to the state statute or federal law or regulation whenever possible.

Issue Number Five:

The final issue to be addressed is whether providing the records on October 17, 1997, was sufficient to comply with the open records request made on October 16. N.D.C.C. § 44-04-18 requires that records of a public entity be "open and accessible for inspection during reasonable office hours". This does not require that the records or information in them be available after office hours.

Based on the information received from Ms. Burke, she did not have any record containing the names of the juveniles and, therefore, her releasing the names the next day when she had records identifying them complied with the requirements of the open records law.

According to the information received from Deputy Wutzke, he did have the names of the juveniles in his handwritten field notes at the time he spoke to Ms. Cole on the afternoon of October 16. Consequently, the names should have been made available to anyone requesting them either through making accessible the field notes containing the names or if acceptable to Ms. Cole, in lieu of releasing the field notes, the names could have been given over the phone under N.D.C.C. § 44-04-18.10(3). Since a record existed in the Burleigh County Sheriff's Department at the time Ms. Cole requested the names of the occupants of the cars, and the names were not covered by any exception to the open records law, the law required the names be released at that time. As stated above, there has been no claim that any of the juveniles were injured seriously enough to invoke the provisions of N.D.C.C. § 39-08.1-10.1. While the reasonableness of any delay is generally a question of fact, under these circumstances, any delay was unreasonable. Therefore, making the records available when the offices opened the next morning was insufficient to meet the requirements of the statute.

CONCLUSION

Based upon the above analyses, it is my opinion that there was a violation of the open records laws as a result of the failure of the Burleigh County Sheriff's Department to release the names of the juveniles involved in the car accident when they were requested from Deputy Wutzke on the afternoon of October 16, 1997. The sheriff's department was acting on advice of the Burleigh County State's Attorney when it refused to release the names of the juveniles. Although the advice is inconsistent with this opinion, at the time no Attorneys General opinion on the subject had been issued and therefore, the Burleigh County Sheriff's Department did have a right to rely upon advice of its legal advisor.

STEPS NEEDED TO REMEDY VIOLATION

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None. The violation was remedied to the extent possible when the records were made available the next morning.

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